

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

O.Z. MARTIN,

Plaintiff,

No. CIV S-04-2360 MCE CMK P

vs.

EDWARD ALMEIDA, et al.,

Defendants.

ORDER

Plaintiff is proceeding without counsel and in forma pauperis in this civil rights action. Plaintiff alleges that his rights under the Americans with Disabilities act and his rights under the Eighth Amendment were violated when defendants refused to provide him with a double mattress. By order filed January 4, 2004, the court granted plaintiff's motion to file an amended complaint, and by order filed January 6, 2004, the court found that the amended complaint stated a cognizable claim against defendants Almeida, Carey, and Stocker.

In his amended complaint plaintiff stated that he was suing each defendant in his individual capacity; however plaintiff also stated that he "will seek to amend the complaint to add the current director [of the Department of Corrections and Rehabilitation] as necessary." (Am. Compl. at 1:6-8.) The court liberally construed the pleading in the light most

1 favorable to the plaintiff, and resolved all doubts in the plaintiff's favor. See Jenkins v.
2 McKeithen, 395 U.S. 411, 421 (1969). Thus, the court assumed that despite statements in his
3 amended complaint that he was suing each defendant in his individual capacity, plaintiff intended
4 to sue all defendants in their individual and in their official capacities.

5 In an order filed November 1, 2006, the court ordered service on defendant Tilton,
6 who was substituted for defendant Almeida, defendant Carey, and defendant Stocker.¹ On
7 January 31, 2007, plaintiff filed a "Motion to Vacate Scheduling Order And Relief From Error Of
8 The Court." In this filing he states that his amended complaint "clearly sues defendants Edward
9 Almeida, Tom L. Carey, Captain J. Stocker, et al., in their individual capacities...for Eighth
10 Amendment violations" (Doc. 50 at 1:20-22.) He further states that "the court erroneously has
11 substituted Jeanne Woodford and now James Tilton as defendants."

12 The court understands plaintiff to assert that he is suing defendants in their official
13 capacities only. Individual defendants may not be sued in their individual capacities under Title
14 II of the ADA; they may be sued in their official capacities because suing an individual in his
15 official capacity is treated the same as suing the entity itself. See Kentucky v. Graham, 473 U.S.
16 159, 166 (1985); see also, e.g., Walker v. Snyder, 213 F.3d 344, 346 (7th Cir.2000) ("[A]s a rule
17 there is no personal liability under Title II..."). Therefore, plaintiff does not state a cognizable
18 ADA claim against defendants.

19 As plaintiff intended to sue defendants in their individual capacities only, the court
20 will order that the clerk terminate James Tilton from the list of defendants. The court will order
21 service on defendant Edward Almeida, Jr., who is sued in his individual capacity. The court
22 declines to make any change to the scheduling order at this time; however, depending on how
23 quickly defendant Almeida is served, the court may make adjustments at a later date.

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25 ¹Due to a mistake, the original complaint was served on defendants. After realizing the
26 mishap, the court ordered the operative amended complaint served on defendants on November
1, 2006.

1 IT IS ORDERED that:

2 1. Plaintiff's motion (doc. 50) is granted in part and denied in part.

3 2. Plaintiff's motion is granted to the extent that the court finds that service is
4 appropriate for defendant Edward Almeida, Jr., as plaintiff states a cognizable eighth amendment
5 claim against him.

6 3. The Clerk of the Court shall send plaintiff one USM-285 forms, one summons,
7 an instruction sheet and a copy of the complaint filed December 20, 2004.

8 5. **Within fifteen days** from the date of this order, plaintiff shall complete the
9 attached Notice of Submission of Documents and submit the following documents to the court:

10 a. The completed Notice of Submission of Documents;

11 b. One completed summons;

12 c. One completed USM-285 form for the defendant listed in number 2
13 above; and

14 d. two copies of the endorsed complaint filed December 20, 2004.

15 6. Plaintiff need not attempt service on defendants and need not request waiver of
16 service. Upon receipt of the above-described documents, the court will direct the United States
17 Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4
18 without payment of costs.

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1 7. In light of plaintiff's assertions in his motion that he is suing defendants in their
2 individual capacities, the court finds that defendant has failed to state a cognizable ADA claim
3 against defendants.

4 8. Plaintiff's motion (doc. 50.) is denied to the extent that he seeks relief from the
5 scheduling order.

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7 DATED: February 13, 2007.

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10 **CRAIG M. KELLISON**
11 UNITED STATES MAGISTRATE JUDGE
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vs.

Defendants.

NOTICE OF SUBMISSION
OF DOCUMENTS

_____/

Plaintiff hereby submits the following documents in compliance with the court's
order filed _____:

_____ completed summons form

_____ completed USM-285 forms

_____ copies of the _____
Complaint/Amended Complaint

DATED:

Plaintiff